WASHINGTON STATE COURT OF APPEALS
IN AND FOR DIVISION II

THOMAS D. REYNOLDS Appellant, vs. STATE OF WASHINGTON, Respondent,	No. 41609-3-II RAP 10.10 STATMENT OF ADDITIONAL GROUNDS

COMES NOW Appellant, Thomas D. Reynolds, pro se, HERBY Submits the following RAP 10.10 Statement of ADDITIONAL GROUNDS

I. ISSUES PRESENTED

a. Should Appellant Counsel argue the special verdict jury instruction number 14 was an incorrect statement of law and amounted to an error of constitutional magnitude?

b. Should Appellant Counsel argue the admission of the computer generated map was improper lacking authentication for evidence?

c. Should Appellant Counsel argue the admission of testimony of an intoxicated witness?

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d. Should Appellant Counsel argue Appellants Sixth Amendment right to confrontation to the admission of witnesses drug use?

e. Should Appellant counsel argue Appellants Sixth Amendment right to confrontation of the confidential informants?

f. Should the Court remand this case for new trial based on an insufficient record on review?

II. RELEVANT FACT

Mr. Reynolds was charged by information filed in Cowlitz County Superior Court with one count of delivery of a controlled substance (heroin),in violation of RCW 69.50.401(1). CP 5-6. The information contained a special allegation under RCW 69.50.435(1)(c) that the offense was committed within 1000 feet of a school bus route stop. CP 6. After jury trial Mr. Reynolds was convicted of delivery of a controlled substance and the jury found that the crime was committed within 1000 feet of a school bus route stop for the 24 month enhancement of his sentence.

On June 2, 2011, Mr. Reynolds Appellant Counsel, Peter B. Tiller filed an opening brief on behalf of Mr. Reynolds, in which he argued the trial court errored when it denied Mr. Reynolds a sentence below the standard range, and that Mr. Reynolds was deprived of his constitutional right to effective assistance of counsel at sentencing.

Mr. Reynolds received the report of proceedings and discovered that there were numerous errors and missing parts in the record that are relevant to issues he wishes to raise on appeal. For example part Ed Fairman's testimony is missing from the record and parts of the pre trial hearings. Also all through the report of proceedings are inaccurately transcribed and missing relevant portions.

Mr. Reynolds contends that the following issues have probable merit and mow moves the court to order Appellants Counsel Peter B. Tiller to brief why these issues have no merit on direct appeal.

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III. ARGUMENT

a. Appellant counsel should argue the special verdict instruction number 14 was an incorrect statement of the law and amounted to an error of constitutional magnitude. The jury in Mr. Reynolds case was instructed it must be unanimous in answering the special verdict forms. Number 14, the concluding instruction provided in relevant part:

> "You will also be given a special verdict form for the crime of Delivery of a Controlled Substance as charged in count I.

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> If you find the defendant not guilty of this crime, do not use the special verdict form.
>
> If you find the defendant guilty of count I, you will then use the special verdict form designated for Count I and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer "yes" on the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any of you have a reasonable doubt as to this question, you must answer "no".

See attached Appendix A.

In instruction number 13. the Court instructed the jury "Because this is a criminal case, each of you must agree for you to return a verdict." See attached Appendix B.

A unanimous jury decision is not required to find the state has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A no unanimous jury decision is a final determination that the state has not proved the special verdict beyond a reasonable doubt . State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In keeping with this rule, it is manifest constitutional error to instruct the jury it must be unanimous in order to find the *absence* of such a special finding. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Ryan, 160 Wn.App. 94.

In Bashaw, Bertha Bashaw was convicted of three drug deliveries. Because the jury determined that each delivery took place within 1,000 feet of a school bus route stop, her maximum sentence was doubled by statute. Bashaw, 169 Wn.2d at 137. In the jury instruction explaining the special verdict forms, the jury was instructed: "Since

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this is a criminal case, all twelve of you must agree on the answer to the special verdict." Bashaw, 169 Wn.2d at 139 (citation to record omitted). On appeal, Bashaw argued that the jury instruction incorrectly required unanimity for finding that her actions did not take place within 1,000 feet of the school bus route stop. Bashaw, at 137.

The Supreme Court agreed:

> Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, See Goldberg, 149 Wn.2d at 893, 72 P.3d 1083, it is not required to find the *absence* of such a special verdict finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis in original).

> The state argued the error was harmless, but the court disagreed:
> In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The State argues, and the court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court's instruction to a nonunanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that the direction to reach unanimity was given preemptively.
> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." Id. at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore

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> cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147-48.

In Ryan, the Court held the nature of the error addressed in Bashaw was a constitutional due process violation. As the Court explained:

> The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as "the procedure by which unanimity would be appropriately achieved," and referred to "the flawed deliberative process" resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

Ryan, 160 Wn.App. 944, 2011 WL 1239796, *2 (footnotes omitted CF. State v. Nunez, 160 Wn.App. 150, 163, 248 P.3d 103 (2011))

Accordingly, where Ryan's jury was instructed it must unanimously have a reasonable doubt to answer "no" to the special verdict, it was error Ryan could raise for the first time on appeal and entitled him to vacation of the deadly weapon enhancement. Ryan, 2011 WL 1239796, *2-3

The jury in Mr. Reynolds case was instructed it must be unanimous in answering the special verdict forms. Number 13, the concluding instruction provided in relevant part:

> Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror musty sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

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See Appendix B (emphasis added).

> "You will also be given a special verdict form for the crime of Delivery of a controlled Substance as charged in count I. If you find the defendant not guilty of this crime, do not use the special verdict form.
>
> If you find the defendant guilty of count I, you will then use the special verdict form designated for Count I and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer "yes" on the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any of you have a reasonable doubt as to this question, you must answer "no".

See attached Appendix A. (emphasis added)

As in Bashaw and Ryan, the jury here was instructed it must be unanimous to return a verdict. Although the last line of the instruction did not state the jury must unanimously have a reasonable doubt to answer "no" to the special verdict, the jury would have no reason to distinguish between a general verdict and a special verdict. It was instructed it must be unanimous to return a verdict, any verdict, period. Accordingly, the error here is no different than in Bashaw and Ryan. It was an error of constitutional magnitude that may be raised for the first time on appeal and is not harmless, as it resulted in a flawed deliberative process.

Therefore, Mr. Reynolds respectfully requests the court order Appellant counsel to brief this issue as to why it has no probable merit.

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b. Appellant counsel should argue the admission of the computer generated map was improper lacking authentication for evidence. The state introduced Ruth Bunch, Geographic Information Systems Coordinator for the city of Longview to establish that Mr. Reynolds crime happened within 1000 feet of a school bus route stop. (Appendix C, Page 145). Ms. Bunch discussed the computer mapping device used but never established that the measuring device used was functioning properly and provided accurate results at the time of its use (See Appendix C, Page 145 – 154). In fact the apartments where the alleged delivery took place was not even on the map that Ms. Bunch provided (See Appendix C, Page 157 Lines 14 – 21).Again the Bashaw court stated:

> I. The Trial Court Abused Its Discretion by Admitting Testimony about the Results of a Measuring Device without Any Showing of Reliability
>
> The first issue in this case concerns the showing of reliability necessary for a trial court to admit testimony about the results of a measuring device. In accordance with analogous precedent, we hold that admission of results from a distance measuring device requires a showing that the particular device was functioning properly and produced accurate results. Because the State produced no evidence that the distance measuring device here produced accurate results, its admission was error and an abuse of discretion. That error, however, was harmless as to counts II and III but not as to count I. Accordingly, we vacate the sentence enhancement with respect to count I on this basis.
>
> *A. Evidence Must Be Authenticated Prior to Admission*
>
> It is fundamental that evidence must be authenticated before it is admitted. *See* ER 901(a). Authentication requires that the proponent produce proof ``sufficient to support a finding that the matter in question is what its proponent claims." *Id.* The party offering the evidence must make a prima facie showing consisting of proof that is sufficient ``to permit a reasonable juror to find in favor of authenticity or identification." *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003); *see also* Judicial Council Cmt. 901, *cited in* 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice 901.1, at 283 n.3 (5th ed. 2007).

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Conceptually, authentication is a process of establishing conditional relevance. *See* Judicial Council Cmt. 901, *cited in* 5C Tegland, *supra*, 901.1, at 283 n.3; *see also* Robert H. Aronson, The Law of Evidence in Washington 901.05(1), at 901-12 (4th ed. 2008) (``Unless evidence is in fact what it purports to be, it is not relevant."). As observed in *Washington Practice*, ``a photograph might be relevant, but only if it accurately depicts the subject"; ``[an audio] recording might be relevant, but only if the sounds were recorded faithfully and the voices are accurately identified." 5C Tegland, *supra*, 901.1, at 283. Likewise, a distance measurement may be relevant, but only if it is accurately measured.

In a line of cases analogous to the present one, the courts of this state have held that, under ER 901, speed measuring devices, such as radar devices, must be authenticated in order for their results to be admissible. *See City of Bellevue v. Mociulski*, 51 Wn. App. 855, 859-60, 756 P.2d 1320 (1988); *see also City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431-32, 28 P.3d 744 (2001) (citing *Mociulski*, 51 Wn. App. at {234 P.3d 200} 860-61, with approval); *City of Bellevue v. Lightfoot*, 75 Wn. App. 214, 221, 877 P.2d 247 (1994) (``police traffic radar results are not admissible unless the particular radar device used is shown to be reliable"); *City of Seattle v. Peterson*, 39 Wn. App. 524, 527, 693 P.2d 757 (1985) (holding that evidence of a machine's reliability is a prerequisite to admission of the machine's results). Authentication of such devices requires a showing that the particular unit ``was functioning properly and produced accurate {169 Wn.2d 142} results" at the time it was employed. *Lightfoot*, 75 Wn. App. at 221. 2

We agree with the formulation of the Court of Appeals, as expressed in the speed measuring device line of cases, regarding the authentication required prior to admission of measurements made by mechanical devices. The rules of evidence, analogous case law, and common sense all dictate that before the State introduces evidence that will result in a mandatory penalty enhancement, the State must show that the evidence it relies upon is accurate. Simply put, results of a mechanical device are not relevant, and therefore are inadmissible, until the party offering the results makes a prima facie showing that the device was functioning properly and produced accurate results. This is consistent with the rationale underlying the requirement of authentication. *See* 5C Tegland, *supra*, 901.1, at 283. As such, we hold that the principle articulated in the context of speed measuring devices also applies to distance measuring devices: a showing that the device is functioning properly and producing accurate results is, under ER 901(a), a prerequisite to admission of the results.

Bashaw 169 wn.2d at 141-42.

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Therefore, Mr. Reynolds respectfully requests the Court order Appellant Counsel to brief this issue as to why it has no probable merit.

c. Appellant Counsel should argue the admission of testimony of an intoxicated witness was a manifest abuse of discretion. The state produced Edward Roy Fairman to testify. Before Mr. Fairman was to testify in front of the jury, Mr. Morgan notified the court that Mr. Fairman was intoxicated and admitted to using heroin earlier in the day (See Appendix D, Page 77-78). Mr. Morgan then moved to exclude Mr. Fairman's testimony pursuant to RCW 5.60.050 which provides.

> "The following persons shall not be competent to testify" (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050 (emphasis mine);

This rule mandates that a person who is intoxicated at the time of their testimony "Shall not be competent to testify" The Supreme Court has determined that:

> N. Singer, *Statutory Construction* 57.03 (4th ed. 1984) states as follows:
>
> Where the language of a statute is clear and unambiguous, courts may hold that the construction intended by the legislature is obvious from the language used. The ordinary meaning of language should always be favored. The form of the verb used in a statute, i.e., something "may," "shall" or "must" be done, is the single most important textual consideration determining whether a statute is mandatory or directory. . . .
>
> . . . "Ordinarily, the use of the word 'shall' in a statute carries with it the presumption that it is used in the imperative rather than in the directory sense. . . ."
>
> (Footnotes omitted.) This rule was explained and applied to a statutory provision of reasonable attorney's fees under a garnishment statute in *Burr v. Lane*, 10 Wn. App. 661, 677-78, 517 P.2d 988 (1984), which held:

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> Whether the word "shall" is to receive a mandatory or permissive interpretation is a matter of legislative intention. *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 97 P.2d 628 (1940). As pointed out in *Snyder v. Cox*, 1 Wn. App. 457, 462 P.2d 573 (1969), a garnishment case in which the court held the word "shall" used in a portion of RCW 7.32.160 is mandatory:
>
> If the right of anyone depends upon giving the word *shall* an imperative construction, the presumption is that *shall* is used in reference to that right or benefit, and it receives a mandatory interpretation.

Singleton v. Frost, 108 Wn.2d 723, 728, 742 P.2d 1224 (1987);

Therefore Mr. Reynolds respectfully requests the Court order Appellant Counsel to brief this issue as to why it has no probable merit.

d. Appellant Counsel should argue Appellants Sixth Amendment right to confrontation to the admission of witnesses drug use. During pre trial motions the Defense counsel moved to admit evidence of Mr. Fairmans drug use at the time that the investigation was ongoing, including on or around February 18, 2010, the day in question (See Appendix F, page 26). Defense Counsel stated he interviewed Mr. Fairman, and Mr. Fairman stated that after interring into a contract as a confidential informant , he still used heroin on a daily basis. Id. "The Court replied before he testifies let's ask him directly weather he had used that day, and it's probably relevant" (See Appendix F, Page 27). The Court reserved judgment on ruling while the Court familiarized its self with the case (See Appendix F, Page 29). Then when the issue was re addressed by the court Mr. Fairman was not questioned about his drug use on that day (See Appendix D, Page 76 – 77). The Court ruled "all right. I failed to see the relevance so I am not allowing any testimony about his drug use." (See Appendix D, Page 77). It should be remembered that Mr. Fairman admitted to using heroin on the

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day of his testimony, but the Court would not allow Defense Counsel to question him about this use.

Therefore Mr. Reynolds respectfully requests the Court order Appellant Counsel to brief this issue as to why it has no probable merit.

e. Appellant Counsel should argue Appellants sixth amendment right to confrontation of the confidential informants placing defendant on a list of higher level drug dealers. The state produced Detective Streissguth, who testified that Mr. Reynolds had been placed on a list of "next level up" drug dealers (See Appendix G, Page 37, line 2 – 8). The Detective determined this through intelligence and provided by several different informants who provide intelligence on a daily basis. The state next asked "so would it be fair to say then you take the list he provides then you cross reference it with the intelligence you already have?" The detective answered "definitely" (See Appendix G, Page 37, Lines 22 – 25). The defense attorney then objects for hearsay. The Court overruled the objection. Then the state questioned "and so that was what ultimately identified in this case you decided to go after Mr. Reynolds and he was on the list." (See Appendix G, Page 38, Line 4 – 6). The Detective answered correct. The Defense attorney again objected to hearsay citing the sixth amendment right to confrontation. The Court did not sustain the objection and the state was allowed to continue along that line of questioning (See Appendix G, Pages 36 – 39).

In State v. Pugh, 167 Wn.2d 825, , 225 P.3d 892 (2009) the supreme Court stated :

> "The Sixth Amendment provides that ``[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The confrontation clause ``applies to

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> 'witnesses' against the accused-in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citation omitted). It ``bars 'admission of testimonial statements of a witness who did not appear at trial unless'" the witness ``'was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *Crawford*, 541 U.S. at 53-54). Nontestimonial hearsay, on the other hand, is admissible under the Sixth Amendment {167 Wn.2d 832} subject only to the rules of evidence. *Davis*, 547 U.S. at 821.

State v. Pugh, 167 Wn.2d at 832.

Therefore Mr. Reynolds respectfully requests the Court order appellant counsel to brief this issue.

f. The Court Should remand This Case For A New Trial Based On An Insufficient Record On review. Mr. Reynolds received the verbatim report of proceedings and discovered that there was several missing parts in the record and several errors in transcribing the report of proceedings. There is so many errors and missing portions throughout the transcripts that Mr. Reynolds cannot point to each discrepancy. Mr. Reynolds believes that the record cannot be supplemented by affidavits as the missing portions and errors are to numerous. In ***State v. Tilton***, 149 Wn.2d 775, 72 P.3d 735 (2003) the Supreme Court stated;

> "The usual remedy for a defective record is to supplement the record with appropriate affidavits and have discrepancies resolved by the judge who heard the case. RAP 9.3, 9.4, 9.5. However, where the affidavits are unable to produce a record which satisfactorily recounts the events material to the issues on appeal, the appellate court must order a new trial. For example, in *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963), this court held that the reconstructed record was insufficient and ordered a new trial. The

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> court reporter's notes from the entire trial were lost and the trial judge prepared a narrative statement of facts based on his notes. *Id.* at 65.
>
> This court found the reconstructed record inadequate. The defense attorney, who had not been the attorney at trial, was unable to test the "sufficiency of completeness" of the narrative statement of facts and was unable to satisfactorily determine what errors to assign for review. *Id.* at 67. The lack of a sufficient record constituted a denial of due process, and the court reversed the convictions and remanded for a new trial. "

State v. Tilton, 149 Wn.2d at 783.

Therefore this Court should remand this case back to the trial court for a new trial to establish an adequate record for review.

IV. CONCLUSION

Mr. Reynolds respectfully request the Court order Appellants Counsel Peter B. Tiller, to brief the above arguments as to why they have no probable merit. If the Court or Mr. Tiller finds probable merit on any of the above issues, Mr. Reynolds respectfully requests the Court order Mr. Tiller to add the issue(s) in a supplemental brief and remand this case to the trial court for a new trial to develop an appropriate record on review.

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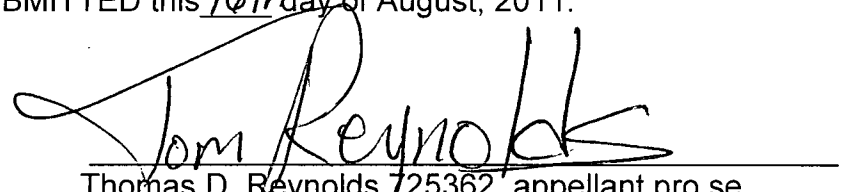
V. VERIFICATION

I declare under penalty of perjury under the laws of Washington State that the foregoing is true and correct to the best of my knowledge.

RESPECTFULLY SUBMITTED this 16th day of August, 2011.



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August 16th, 2011

Clerk, Washington State Court of Appeals Div. II
950 Broadway, Suite 300
Tacoma, Wa 98402

RE: **State v. Reynolds**, No. 41609-3-II

Dear Clerk,

Enclosed please find my RAP 10.10 Statement of Additional Grounds and declaration of service for processing in the above named cause.

Sincerely,

Tom Reynolds

Thomas D. Reynolds

cc. fiile

GR 3.1 DECLARATION OF SERVICE

I, Thomas D. Reynolds declare under penalty of perjury under the laws of Washington State that today I mailed a true copy of my RAP 10.10 Statement of Additional Grounds to Appellant's Counsel, Respondents Counsel and to the Clerk of the Court, at their respective address of record, in State v. Reynolds, COA. No. 41609-3-II, by placing said document in the prison "Legal Mail" system postage pre paid.

DATED this 16th day of August, 2011.

Tom Reynolds

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